

No. 89-1295

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In The  
Supreme Court of the United States  
October Term, 1989

STATE OF CONNECTICUT,

*Petitioner,*

v.

JOHN LONERGAN,

*Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A  
WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CONNECTICUT

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RESPONDENT'S STATEMENT OF  
QUESTION PRESENTED FOR REVIEW

DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BAR A PROSECUTION FOR DRIVING UNDER THE INFLUENCE, AFTER AN ACQUITTAL ON A CHARGE OF SECOND DEGREE MANSLAUGHTER WITH A MOTOR VEHICLE ARISING OUT OF THE SAME INCIDENT, WHEN THE RECORD CLEARLY INDICATES THAT IN THE SECOND PROSECUTION THE STATE WILL RELY UPON AND SEEK TO PROVE THE IDENTICAL ACT OF OPERATING WHILE INTOXICATED THAT WAS NECESSARY TO PROVE THE MANSLAUGHTER CHARGE IN THE FIRST PROSECUTION?

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CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

In addition to the constitutional and statutory authorities cited at pages 2-4 of the State of Connecticut's Petition for a Writ of Certiorari (the "State's Petition"), article first, § 9 of the Connecticut constitution is also involved in this case. Article first, § 9 provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

## STATEMENT OF THE CASE

The respondent, John Lonergan, was charged with manslaughter in the second degree with a motor vehicle while intoxicated, in violation of Connecticut General Statutes § 53a-56b, and with operating a motor vehicle while under the influence of liquor, in violation of Connecticut General Statutes § 14-227a. The charges arose out of a motor vehicle accident that occurred on a public highway in Hartford, Connecticut on May 22, 1985. *State v. Lonergan*, 213 Conn. 74, 76, 566 A.2d 677 (1989) (State's Appendix at A3).<sup>1</sup> The respondent pleaded not guilty to both charges. The state elected to sever the two counts and proceed to trial on the manslaughter count only. That count was tried to the court. At the close of the state's case-in-chief, the respondent successfully moved for a judgment of acquittal. The state then attempted to prosecute the defendant for operating a motor vehicle under the influence. The respondent moved for dismissal, arguing that a second prosecution was barred by the double jeopardy clause of the fifth amendment to the United States Constitution and article first, § 9 of the Connecticut Constitution.

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<sup>1</sup> The Connecticut Supreme Court's decision in this case is reprinted beginning at page A1 of the appendix to the state's petition for a writ of certiorari (the "State's Appendix"). The Connecticut Appellate Court's opinion is reprinted beginning at page A28 of the State's Appendix. Hereinafter, in citing the Supreme and Appellate Court opinions, the respondent will refer only to the appropriate page citations in the State's Appendix.



In arguing that double jeopardy did not bar the second prosecution, the state contended that that requirement in § 53a-56b that the defendant's conduct be "in consequence of his intoxication" was distinct from the requirement in § 14-227a that the defendant be "under the influence" of liquor, and that the two offenses therefore were not the "same" under *Blockburger v. United States*, 284 U.S. 299 (1932). (State's Appendix at A31). The trial court rejected this distinction and granted the respondent's motion to dismiss. (*Id.*)

On appeal to the Connecticut Appellate Court, the state abandoned the argument that it had made to the trial court, and raised a new claim: that the two offenses with which the respondent had been charged were not the "same offense" for double jeopardy purposes because (1) the charge of operating under the influence required proof that the defendant operated a motor vehicle in one of the geographical locations specified in the statute, an element not required by § 53a-56b; and (2) the charge of second degree manslaughter with a motor vehicle required proof of the death of another person, an element not required by § 14-227a. (State's Appendix at A32-A33).

In affirming the decision of the trial court, the Appellate Court held that it was clear from the record that in a second prosecution for driving under the influence, the state would "rely on and seek to prove . . . the same act of operating while intoxicated on a public roadway necessary to prove the manslaughter charge in the first prosecution." (State's Appendix at A52-A53). Because the respondent had "already been acquitted of conduct that is here shown to be a necessary element of a less serious crime for which he [had] been charged," the Appellate

Court held that a second prosecution was barred by double jeopardy principles.<sup>2</sup> (State's Appendix at A53).

The state appealed to the Connecticut Supreme Court from the Appellate Court's judgment. The Connecticut Supreme Court affirmed. The Supreme Court, like the Appellate Court, concluded that the appellate record, and the state's concessions at oral argument on the appeal, made it "evident that the state intends to relitigate the issue of whether the defendant was operating while under the influence of liquor." (State's Appendix at A22). Like the Appellate Court, the Supreme Court held that because the respondent had already been acquitted of conduct that was a necessary element of the lesser crime for which the state sought to prosecute him, the second prosecution was barred on double jeopardy grounds. (State's Appendix at A22-A23).

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#### REASONS FOR NOT GRANTING THE PETITION

##### I. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT IS SUPPORTED BY ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL AND COMMON LAW GROUNDS AND SHOULD NOT BE REVIEWED BY THIS COURT

This Court has held that when a state court decision is based alternatively on federal and state law, and the decision "indicates clearly and expressly" that the state law grounds for the decision are "separate, adequate, and

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<sup>2</sup> The Appellate Court cited both the federal and state constitutions in support of its decision. (State's Appendix at A35).

independent," this Court will decline to review the state court decision. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *New York v. Class*, 475 U.S. 106, 110 (1986).

The Connecticut Supreme Court's decision in *State v. Loneragan* is clearly and expressly based on Connecticut's constitution and common law. In ruling that the respondent's prosecution for operating a motor vehicle under the influence, after his acquittal for manslaughter in the second degree with a motor vehicle, is barred by principles of double jeopardy, the court noted that, unlike the federal constitution, "the Connecticut constitution does not include a specific double jeopardy provision. . . ." (State's Appendix at A5). Nevertheless, the court held that article first, § 9 of the Connecticut constitution, which provides that "no person shall be arrested, detained or punished, except in cases clearly warranted by law," embodies the protection against double jeopardy. *Id.*, citing *Kohlfuss v. Warden*, 149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928 (1962). In addition, the court made specific reference to Connecticut common law, which it held, " 'has long recognized as a fundamental principle of common law that no one shall be put in jeopardy more than once for the same offense.' " (State's Appendix at A5-A6, quoting *State v. Langley*, 156 Conn. 598, 600-01, 244 A.2d 366 (1968), cert. denied, 393 U.S. 1069 (1969)).

In rendering its decision, the Connecticut Supreme Court took care to analyze and distinguish its prior decisions defining the scope of double jeopardy protection, which, the state argued, required a strict application of the double jeopardy test set forth in *Blockburger v. United*

*States*, 284 U.S. 299 (1932). Those earlier Connecticut Supreme decisions, including *State v. McCall*, 187 Conn. 73, 444 A.2d 896 (1982) and *State v. Truppi*, 182 Conn. 449, 468, 438 A.2d 712 (1980) *cert. denied*, 451 U.S. 941 (1981), considered the application of double jeopardy principles in *single* prosecution cases, where the defendant's interest in avoiding successive punishments, but not successive prosecutions, is implicated. (State's Appendix at A18). The Connecticut Supreme Court, acknowledging this distinction, noted that its prior decisions had "not indicated what analytical framework should be utilized to determine whether *successive prosecutions* involve the 'same offense' in violation of the double jeopardy clause." *Id.* In rendering a decision applicable *only* to cases involving successive prosecutions, the Connecticut Supreme Court fashioned an independent state rule of law, and defined a separate state law standard for the application of double jeopardy principles in single prosecution cases.

The Connecticut Supreme Court's decision also takes cognizance of Connecticut's common law policy permitting the state to sever into separate prosecutions separate charges against a defendant arising out of a single criminal occurrence or transaction. *Id.* n.7; see *State v. Ellis*, 197 Conn. 436, 474, 497 A.2d 974 (1985). Connecticut, unlike many states, does not have a compulsory joinder statute. *State v. Lonergan* does not impose a state common law or constitutional ban on severance. However, it does place a new gloss on Connecticut common law by holding that in limited circumstances such severance may, but by no means must, trigger double jeopardy. *Id.* The Connecticut Supreme Court's recognition of the impact of its decision on state rules of decision governing the severance of

criminal charges arising out of the same transaction is another indication that the court's decision is based on adequate and independent state grounds.

Although the Connecticut Supreme Court's decision cited federal precedents, most notably *Illinois v. Vitale*, 447 U.S. 410 (1980) and *In re Nielsen*, 131 U.S. 176 (1889), the court's decision was not controlled by these precedents. In fashioning a rule of double jeopardy uniquely applicable to successive prosecution cases, the Connecticut Supreme Court relied on its own constitution and common law. The court's decision is not one of those "ambiguous or obscure adjudications" that this court decried in *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (citation omitted). To the contrary, the decision of the Connecticut Supreme Court is firmly grounded in state law. Under *Michigan v. Long* and its progeny, this Court should decline to review the Connecticut Supreme Court's decision because the decision is supported by adequate and independent state grounds.

## II. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT IS CONSISTENT WITH DECISIONS OF THIS COURT AND DOES NOT MERIT REVIEW BY CERTIORARI

The holding of the Connecticut Supreme Court in *State v. Lonergan* is that where the state elects to prosecute successively charges arising out of a single criminal transaction or occurrence, and the identical evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged in the second prosecution,

prosecution of the second offense is barred on double jeopardy grounds. (State's Appendix at A21-A22).

This Court has consistently recognized marked differences between the core double jeopardy prohibition against multiple prosecutions and the limited double jeopardy protection against cumulative punishment for multiple offenses charged in a single prosecution. *See, e.g., Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Whalen v. United States*, 445 U.S. 684, 700-01 (1980) (Rehnquist, J. dissenting); *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Justice Blackmun, writing for the Court in *Jeffers v. United States*, 432 U.S. 137 (1977), noted that "[w]hat lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for 'the same offense.'" *Id.*, 150.

The Connecticut Supreme Court's decision recognizes the heightened importance of double jeopardy principles in cases involving successive prosecutions. As the Connecticut Appellate Court held:

The interest of the defendant in single trial prosecution is in not having more punishment imposed than that intended by the legislature. When the issue is one of multiple trials, the double jeopardy clause vindicates principles of finality and repose of former judgments and of fundamental fairness that simply are not involved in a single prosecution of joint charges. Basically, it insures that having once "run the gauntlet" of a criminal trial to either a judgment of conviction or acquittal, a person ought not to be required to run essentially the same gauntlet again.

(State's Appendix at A51-52).



The state urges this Court to overlook the clear distinction between single and successive prosecution cases and mechanically apply *Blockburger v. United States*, 284 U.S. 299 (1932) as the sole test for determining whether two criminal charges constitute the "same offense" for purposes of double jeopardy. The *Blockburger* test, however, is not even a rule of law, but merely a means of ascertaining legislative intent. *Garrett v. United States*, 105 S.Ct. 2407, 2411 (1985); *Albernaz v. United States*, 450 U.S. 333, 340 (1981). This Court has never treated *Blockburger* as completely dispositive of double jeopardy claims in successive prosecution cases. In *Brown v. Ohio*, 432 U.S. 161, 166 n.6, this Court held that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. . . . [S]uccessive prosecutions will be barred in some circumstances when the second prosecution requires the relitigation of factual issues already resolved by the first." In *In re Nielsen*, 131 U.S. 176 (1889), cited in *Brown, supra*, this Court held that a Mormon's conviction on a charge of cohabiting with two wives barred his subsequent prosecution for adultery with one of the wives on the day following the end of the cohabitation period. Although the offenses of adultery and cohabitation each required proof of an element that the other did not, the Court nevertheless held the separate offenses to be the "same" for double jeopardy purposes. *Id.* at 187-88. In *Harris v. Oklahoma*, 433 U.S. 682 (1977), this Court held that a defendant who was prosecuted for a felony murder in which the underlying felony was a robbery could not subsequently be prosecuted for the robbery, even though,

under a strict application of the *Blockburger* test, the statutory elements of the two offenses were not the "same."

In *Illinois v. Vitale*, 447 U.S. 410 (1980), this Court held that in certain limited circumstances, resolution of a double jeopardy claim involving successive prosecutions<sup>3</sup> may involve review of the actual proof required to establish the pertinent offenses. Under *Vitale*, the "mere possibility" that the state will rely on the same evidence in the second prosecution does not raise a double jeopardy bar. Only if the second prosecution will *necessarily* involve the same evidence offered in the first case is the second prosecution forbidden by the double jeopardy clause. *Id.* at 419-20.<sup>4</sup>

In this case, the state does not dispute that it will rely on evidence of the identical conduct that it relied upon in

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<sup>3</sup> The Connecticut Supreme Court acknowledged that "there is no dispute that [*United States v.*] *Vitale* reaffirmed the application of the traditional *Blockburger* test in single prosecution cases." (State's Appendix at A18).

<sup>4</sup> In *Illinois v. Vitale*, the defendant was charged with failure to reduce speed to avoid an accident, pleaded not guilty, and was convicted after a jury trial. The state subsequently charged the defendant with involuntary manslaughter. This Court held that double jeopardy would bar the second prosecution only in one of two circumstances: (1) if, as a matter of law, the state was always bound to prove the elements of the offense of failure to reduce speed to convict the defendant of involuntary manslaughter; or (2) if, under the facts of the case, the state would *necessarily* rely on the *same proof* necessary to establish failure to reduce speed to convict the defendant of involuntary manslaughter. *Id.* at 419-20. Because the "reckless act or acts the state [would] rely on to prove manslaughter [were] still unknown," this Court held that its resolution of the double jeopardy question was premature. *Id.* at 421.



the first prosecution for manslaughter in order to prove driving under the influence in a subsequent prosecution. The state also does not dispute that the evidence used to prosecute the defendant for manslaughter is the *sole* evidence that will be offered to prove an essential element of the driving under the influence charge, that is, that the defendant operated a motor vehicle on a public highway. Thus, the state's only grounds for challenging the Connecticut Supreme Court's decision is that the court did not ignore the factual posture of the case and rigidly adhere to the *Blockburger* test in its double jeopardy analysis. Because the *Blockburger* test is not a uniform rule of decision in double jeopardy cases, however, the Connecticut Supreme Court was not obliged to follow it formulaically. The state's petition for certiorari should be denied.

The state also argues that the Connecticut Supreme Court's decision "effectively eviscerates [the] prosecutorial discretion of the state" by compelling joinder of all offenses arising out of a single criminal occurrence or transaction. (State's petition at 9). This is not the case. *State v. Lonergan* does *not* hold that double jeopardy principles require compulsory joinder. As the Connecticut Supreme Court, quoting the Connecticut Appellate Court, stated: "'Although the state may elect to sever for trial charges arising out of the same transaction or occurrence, it must do so in full cognizance of the enhanced double jeopardy protection afforded to the defendant as a result of forcing him to withstand more than one criminal prosecution.'" (State's Appendix at A19). Under *State v. Lonergan*, double jeopardy bars a second prosecution *only* if the state must necessarily rely on the same proof that it

relied on in the first prosecution as the sole evidence to prove the offense charged in the second.

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### CONCLUSION

The Connecticut Supreme Court's decision in *State v. Loneragan*, like that of the Connecticut Appellate Court, is soundly reasoned and firmly rooted in Connecticut constitutional and decisional law. Because the Connecticut Supreme Court's decision is based on adequate and independent state grounds, this Court should not undertake to review the decision. Furthermore, the Connecticut Supreme Court's decision does not merit review by certiorari because, in articulating a narrowly-circumscribed double jeopardy test uniquely applicable to successive prosecution cases, the Connecticut Supreme Court acted consistently with decisions of this Court and federal constitutional law.

For all of the foregoing reasons, the respondent, John Lonergan, respectfully urges that this Court deny the state's petition for a writ of certiorari.

Respectfully submitted,

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